Party-Appointed Hit Men: Contingency Fees for Arbitrators After *Aetna Casualty & Surety Co. v. Grabbert*

I. INTRODUCTION

Court sanctioned, nonbinding arbitration is one of the most widely used methods of alternative dispute resolution (ADR) today. One form of nonbinding arbitration allows each opposing party to appoint an arbitrator, with a third arbitrator being selected by the party-appointees to serve as chairperson. After parties present evidence in an arbitration hearing conducted by the chairperson, the arbitrators reach a verdict and present their ruling to the parties. If the parties agree to the panel's finding, a final judgment will be entered by the sanctioning court in accordance with the panel's recommendations. If the parties cannot reach an agreement, either party typically has the right to challenge the findings of the panel in a more traditional forum.

Generally, arbitrators are obligated to view the evidence objectively in reaching their decisions. However, party-appointed arbitrators are permitted to pursue their appointer's interests to a certain degree. Such pursuit will normally be a result of the arbitrators' specialized expertise in, or experience with, the specific claim of the party who appointed them. An inherent conflict exists between allowing an arbitrator to represent a party's interests, and requiring impartiality. Such conflict leads to repeated challenges of arbitral awards.

The impetus to this Note is the April 1991 decision in *Aetna Casualty & Surety Co. v. Grabbert*,[1] involving an issue of first impression to the Rhode Island Supreme Court. Although only binding in Rhode Island, the decision in *Grabbert* may serve to "undermine[] public confidence in and the integrity of the arbitration process" and "detract[] from its legitimacy as an alternative method of private dispute resolution"[2] nationwide.

II. THE CASE

Mr. Grabbert, the claimant, was involved in an automobile accident and sought to recover under the uninsured motorist provision of his Aetna insurance policy. When the parties failed to reach a mutually satisfactory settlement, Grabbert requested and was granted a nonbinding arbitration of his claim pursuant to an arbitration clause found within the

1. 590 A.2d 88 (R.I. 1991).

2. *Id.* at 92.

policy.[3] In accordance with the terms of the arbitration clause, each party chose their own arbitrator, and the two party-appointed arbitrators chose a third to serve as chairperson. The arbitration panel returned a unanimous verdict for Grabbert and awarded him $43,550, plus costs incurred in pursuing his claim, including his arbitrator's fee. Grabbert's counsel forwarded a final bill to Aetna which included a sum designated as the arbitrator's fee. The arbitrator's fee was for $4,355, exactly 10% of the award. Later the arbitrator's fee was reduced to $435 under the guise of a typographical error. Grabbert's arbitrator, however, admitted that it was his customary practice to charge a fee based on a percentage of the award received by the claimant.[4] Grabbert and his arbitrator did not discuss a fee agreement prior to the panel's decision.

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3. The arbitration clause provided:

> If we and a *covered person* do not agree:
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> 1. Whether that person is legally entitled to recover damages from the owner or operator of an *uninsured motor vehicle*; or
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> 2. on the amount of damages;
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> either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. Each party will:
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> 1. Pay the expenses it incurs; and
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> 2. Bear the expense of the third arbitrator equally.
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> Unless both parties agree otherwise, arbitration will take place in the county and state in which the *covered person* lives. Local rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding. However, either party may make a written demand for a trial if the amount of damages awarded is greater than the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which *your covered auto* is principally garaged. If this demand is not made within 60 days of the arbitrators' decision, the amount of damages awarded by the arbitrators will be binding.

Id. at 89.

4. *Id.* at 90.

A. Lower Court

Aetna refused to pay and filed a complaint in the superior court demanding a trial by jury on the issue of damages. Aetna alleged that the arbitrators' award was nonbinding as the amount exceeded Rhode Island's 1985 financial responsibility limit of $25,000, giving Aetna the right to challenge the award before a court of law. Furthermore, Aetna challenged the award of Grabbert's arbitrator's fee, relying on the language of the policy requiring each party to pay its own costs.[5] Additionally, Aetna claimed that Grabbert's party-appointed arbitrator's contingent fee created evident partiality in the arbitrator which was in conflict with a Rhode Island statute,[6] requiring the court to vacate the award.[7]

Following *Pepin v. American Universal Ins. Co.*,[8] a decision rendered by the Rhode Island Supreme Court after Aetna filed its complaint, the superior court upheld Aetna's liability for the arbitrator's fee pursuant to the contract provisions. However, the trial court agreed with Aetna that the party-appointed arbitrator's contingent fee was improper and vacated the award on the grounds that such a fee arrangement, contingent on the ultimate award, created an evident partiality inappropriate to one who sits in judgment.[9] Accordingly, the

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5. *Id.*

6. R.I. GEN. LAWS § 10-3-12(2) (1985) provides:

> In any of the following cases, said court must make an order vacating the award upon the application of any party to the arbitration:
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> . . . .
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> (2) Where there was evident partiality or corruption on the part of the arbitrators, or either of them.

7. *Grabbert*, 590 A.2d at 91.

8. 540 A.2d 21 (R.I. 1988).

9. It seems to the Court that one who acts as a judge whose:

> remuneration is related to the amount of any judgment violates the tenets of any judicial function, and [sic] arbitration fee should be reimbursement for time spent performing the function of being a judge with your other two arbitrators, and that the award should consider only the evidence presented to the panel of arbitrators and a good faith effort to arrive at a fair judgment, that when one fee as an arbitrator is keyed to whether or not the person who suggested his name as the arbitrator recovers, and if recovery is made, that the fee arrangement related to a percentage of the award, it destroys in my judgment the validity of that award and strikes at the very heart of a fair and impartial panel considering damages.

superior court vacated the entire arbitration award. The partiality of an arbitrator is grounds for setting aside the award, "but to induce a court to grant leave to revoke the entry of the award, very strong grounds must be shown."[10]

B. Supreme Court

Grabbert appealed the superior court decision to the Rhode Island Supreme Court. The supreme court agreed with the lower court decision, finding that "the party-appointed arbitrator's contingent fee gave him a direct financial interest in the award that was absolutely improper."[11] Despite this finding, the court reversed the lower court's decision because Aetna "failed to demonstrate the required causal nexus between the party-appointed arbitrator's improper conduct and the award that was ultimately decided upon."[12] While broadly denouncing contingency fee arrangements for party-appointed arbitrators, the court let the award stand because of Aetna's failure to demonstrate the causal nexus required for vacating such award.[13] In so doing, the court demonstrated the inherent conflict between party-appointed arbitrators and the requirement for impartiality. The court provided no guidance for developing standards to determine the existence of the forbidden partiality. Instead, it offered only slight justification as to why vacation of this particular award was improper and left the development of a predictable, guiding test to another forum.

. . . .

> I do not countenance that fee arrangement. I think it's destructive of the system, and it undermines peoples' confidence in the system.

Grabbert, 590 A.2d at 91.

10. SIDNEY BILLING, THE LAW OF AWARDS AND ARBITRATIONS 101 (London, William Benning & Co. 1845).

11. *Grabbert*, 590 A.2d at 92.

12. *Id.* at 92.

13. *Id.* at 97.

III. EVIDENT PARTIALITY AS GROUNDS FOR VACATING AWARD

The Federal Arbitration Act[14] (Act) provides the "evident partiality" requirement for vacating an arbitration award. The Act grants discretionary power to vacate an award when evident partiality of an arbitrator exists.[15] While providing the overall test, the Act neither gives useful guidance to its application nor defines the elements necessary to show evident partiality.

Case law varies regarding the necessary elements. The *Grabbert* court stated, "evident partiality is an elusive concept for which no one has been able to articulate a precise legal standard."[16] Most courts addressing the issue, however, have found that evident partiality requires a showing of more than an appearance of bias, but less than actual bias.[17] Despite the adoption by most states of statutes similar to the Federal Arbitration Act,[18] the path to resolving the elements of evident partiality remains unclear.

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14. 9 U.S.C. § 10 (1988 & Supp. III 1991).

15. 9 U.S.C. § 10 (1988 & Supp. III 1991) provides:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration–
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> . . . .
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> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.

16. *Grabbert*, 590 A.2d at 95-96 (approving International Bhd. of Elec. Workers, Local Union No. 323 v. Coral Elec. Corp., 104 F.R.D. 88, 89 (S.D. Fla. 1985)).

17. *Grabbert*, 590 A.2d at 96.

18. Similar statutes include: ALA. CODE § 6-6-14 (1975); ARK. CODE ANN. § 16-108-212 (Michie 1987); GA. CODE ANN. § 9-9-13 (1991); HAW. REV. STAT. § 658-9 (1985); IND. CODE ANN. § 34-4-1-16 (West 1983); KY. REV. STAT. ANN. § 417.160 (Michie Bobbs-Merrill 1991); MASS. ANN. LAWS ch. 150C § 11 (Law. Co-op. 1989); MISS. CODE ANN. § 11-15-21 (1972); MONT. CODE ANN. § 27-5-312 (1991); NEV. REV. STAT. ANN. § 38.145 (Michie 1986); N.M. STAT. ANN. § 44-7-12 (Michie 1978); N.Y. CIV. PRAC. L. & R. LAW § 7511 (McKinney 1980); N.D. CENT. CODE § 32-29.2-12 (1991); OHIO REV. CODE ANN. § 2711.10 (Anderson 1981); R.I. GEN. LAWS § 10-3-12 (1985); TENN. CODE ANN. § 29-5-114 (1980); UTAH CODE ANN. § 78-31a-14 (1987); W. VA. CODE § 55-10-4 (1981).

IV. THE STANDARD

A. Code of Judicial Conduct

The *Grabbert* court does not go so far as to hold arbitrators to the same standard of conduct as judges. The Code of Judicial Conduct[19] requires judges to disqualify themselves from any proceeding if there exists even the slightest financial interest in the controversy or in a party to the proceeding that might be affected by the outcome of the proceeding.[20] The *Grabbert* court agreed with the Second Circuit in *International Produce, Inc. v. A/S Rosshavet*,[21] recognizing that applying such a standard to party-appointed arbitrators would ignore the practical

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19. 28 U.S.C. § 455 (1988).

20. 28 U.S.C. § 455 (1988) provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
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> (b) He shall also disqualify himself in the following circumstances:
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> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
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> > . . . .
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> > (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
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> > . . . .
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> (d) For purposes of this section the following words or phrases shall have the meaning indicated:
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> > . . . .
> >
> > (4) "financial interest" means ownership of a legal or equitable interest however small, or a relationship as director, advisor, or other active participation in the affairs of a party . . . .

21. 638 F.2d 548 (2d Cir.), *cert. denied*, 451 U.S. 1017 (1981).

realities of such arbitration panels.[22] The *Rosshavet* court recognized that "the most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose. Since they are chosen precisely because of their involvement in that community, some degree of overlapping representation and interest inevitably results."[23]

Following the reasoning of the *Rosshavet* court regarding arbitrators, the *Grabbert* court further found that "[i]t is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function."[24] Believing that a relationship to the industry is desirable, if not also to the business of the party appointing the arbitrator itself, the court sanctioned some predisposition on the part of the arbitrator. Thus, it appears that the standards and sanctions of the Code of Judicial Conduct are too strict to apply to the role of a party-appointed arbitrator. A predisposition towards the appointer is consistent with the understanding of the parties. "The reason the parties contract for the choice of their own arbitrator is to ensure that each party will have his or her 'side' represented on the arbitration panel by a sympathetic member."[25]

Furthermore, a party-appointed arbitrator's expertise makes an ADR system desirable to litigants. To impede parties' selection of eligible arbitrators would only force disputants back into the court system and undermine the advantages of this ADR framework. Although there is an inherent conflict between impartiality and expertise, it is one that the courts have countenanced to further the goals of ADR.

B. Code of Ethics for Arbitrators in Commercial Disputes

The *Grabbert* court relied primarily on the Code of Ethics for Arbitrators in Commercial Disputes[26] (Code) in deriving its ruling.[27] The Code is a compilation of ethical guidelines and considerations prepared by a joint committee consisting of special committees of the American Arbitration Association and the American Bar Association.

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22. Aetna Casualty & Surety Co. v. Grabbert, 590 A.2d 88, 92 (R.I. 1991).

23. *See supra* note 21, at 552.

24. *Grabbert*, 590 A.2d at 92 (citing Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 150 (1968) (White, J., concurring)).

25. *Grabbert*, 590 A.2d at 93 (citing Astoria Medical Group v. Health Ins. Plan of Greater New York, 182 N.E.2d 85, 90 (1962)).

26. AMERICAN ARBITRATION ASSOCIATION, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (1977).

27. *Grabbert*, 590 A.2d at 93.

Although the Code is meant to apply to all types of arbitrators, it recognizes "that there is a long-established practice in some types of arbitration for those arbitrators who are appointed by one party, acting alone, to be governed by special ethical considerations."[28] Therefore, the Code, which sets forth its basic tenets in the first six canons, devotes Canon VII to party-appointed arbitration situations.

Canon I commands an arbitrator to uphold the integrity and fairness of the arbitration process. "[A]n arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved."[29] Canon II requires an arbitrator to disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias. Persons who are requested to serve as arbitrators should, before accepting, disclose any direct or indirect financial or personal interest in the outcome of the arbitration and any existing or past financial relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. This canon approves the decision of the United States Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[30] which applied Canon II and held that arbitrators should err on the side of disclosure.[31]

Canon VI of the Code provides that arbitrators should be faithful to the relationship of trust and confidentiality inherent in that office. More specifically, Canon VI provides that such persons should scrupulously avoid bargaining with parties over the amount of payments or engaging in any communications concerning payments which would create an appearance of coercion or other impropriety. Furthermore, the Code provides that it is preferable that before the arbitrator finally accepts appointment, the basis of payment be established and that all parties be informed thereof in writing.[32]

Although the above-cited Code provisions are broad-reaching and expressly apply to all types of arbitration, the Code departs from these sections by propounding specific considerations for party-appointed arbitrations in Canon VII. The Code recognizes that there are many types of tripartite arbitration in which the two arbitrators appointed by the parties are not considered to be neutral and are expected to observe many,

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28. AMERICAN ARBITRATION ASSOCIATION, *supra* note 26, at 4.

29. *Id.* at 5.

30. 393 U.S. 145 (1968).

31. *Id.* at 151-52.

32. AMERICAN ARBITRATION ASSOCIATION, *supra* note 26, at 11-12.

but not all, of the same ethical standards as the neutral arbitrator. Canon VII describes the ethical obligations which non-neutral party-appointed arbitrators should observe and those which are inapplicable to them.[33]

Canon VII provides in applicable part:

A. Obligations Under Canon I:

> Non-neutral party-appointed arbitrators should observe all of the obligations of Canon I to uphold the integrity and fairness of the arbitration process, subject only to the following provisions:
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> > (1) Non-neutral arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, non-neutral arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators.
> >
> > (2) The provisions of Canon I-D relating to relationships and interests are not applicable to non-neutral arbitrators.

B. Obligations Under Canon II:

> Non-neutral party-appointed arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the non-neutral arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any bias which may exist or appear to exist. However, this obligation is subject to the following provisions:
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> > (1) Disclosure by non-neutral arbitrators should be sufficient to describe the general nature and scope of any interest or relationship, but need not include as

33. *Id.* at 13.

> detailed information as is expected from persons appointed as neutral arbitrators.
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> . . . .
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> F. Obligations Under Canon VI:
>
> Non-neutral party-appointed arbitrators should observe all of the obligations of Canon VI to be faithful to the relationship of trust inherent in the office of arbitrator, subject only to the following provision:
>
> (1) Non-neutral arbitrators are not subject to the provisions of Canon VI-D with respect to any payments by the party who appointed them.[34]

Canon VII, therefore, eliminates some of the broad-reaching ethical requirements of the Code when applying it to non-neutral arbitrators. In light of Canon VII, the *Grabbert* court found the contingency fee arrangement at issue violative of the Code's provisions.

V. ETHICAL VIOLATIONS

The *Grabbert* court found that the contingency fee arrangement with Grabbert's appointed arbitrator violated Canons I and II of the Code.[35] The court accepted the fact that a party-appointed arbitrator may be predisposed toward the arbitrator's appointer; however, the court stressed that this allowance does not relieve such an arbitrator from an obligation to act in good faith and with integrity and fairness.[36]

The court asserted that the contingency fee arrangement gave the arbitrator such a direct financial interest in the outcome of the hearing as would tend to destroy pubic confidence in the integrity of the arbitration process. While recognizing that a party-appointed arbitrator "is not bound by the specific proscriptions of Canon VI-D relating to payments made to the party-appointed arbitrator by the arbitrator's appointor,"[37] the court stated,

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34. *Id.* at 12-15.

35. Aetna Casualty & Surety Co. v. Grabbert, 590 A.2d 88, 94 (R.I. 1991).

36. *Id.*

37. *Id.*

> [W]e do not read this exemption to eliminate a party-appointed arbitrator's general ethical obligation under Canon I to uphold the integrity and fairness of the arbitration process. We think that the party-appointed arbitrator's contingent fee so clouds or overshadows the advocacy expected of the arbitrator by vesting him with a direct financial interest in the award that such a fee arrangement cannot be permitted. On this point we are in complete agreement with the trial justice.[38]

Consequently, the court believed that such a violation of Canon I served to destroy public confidence in the integrity of the arbitration process,[39] a result explicitly avoided by the Code.

The court also found a violation of Canon II in Grabbert's arbitrator's failure to disclose to Grabbert, Aetna, or the other two arbitrators his normal practice of charging a ten percent contingent fee for his services as an arbitrator.[40] Any direct or indirect financial interest in the outcome or award of an arbitrator must be disclosed to the parties and the other arbitrators under Canon II. Although this requirement is relaxed under Canon VII-B(1), the court found that "even as mitigated by Canon VII-B(1), [Canon II] required disclosure by the party-appointed arbitrator beyond that found in the contractual provision of the insurance policy that specified that each party was to pay for its own arbitrator."[41] Although this finding appears consistent with the court's general tenor in condemning the arbitrator's contingency fee, it appears to ignore the express language of Canon VII-B(1). Canon VII-B(1) requires only that non-neutral arbitrators disclose information "sufficient to describe the general nature and scope of any interest or relationship."[42] The section does not require the arbitrator to "include as detailed information as is expected from persons appointed as neutral arbitrators."[43] In deciding that an ethical violation was committed in failing to disclose the particulars of Grabbert's arbitrator's fee arrangement, the court failed to give any mitigating effect to Canon VII-B(1) and held Grabbert's arbitrator to a standard similar to Canon II.

Grabbert cited case law supporting the position that a party-

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38. *Id.* at 94-95.
39. *Id.* at 94.
40. *Id.* at 95.
41. *Id.*
42. *Id.*
43. *Id.*

appointed arbitrator's method of compensation is not grounds for vacating an otherwise valid award. However, the court distinguished these cases, citing with approval, a distinction developed by an Illinois appellate court.[44] This distinction rests on whether the arbitrator's interest is direct or indirect.

In the Illinois case, a party-appointed arbitrator for a labor union, of which he was a member, was held to only have an indirect interest arising out of the arbitration in which the union was a party.[45] The *Grabbert* court found, however, that Grabbert's appointed arbitrator benefitted solely on the basis of his role as a party-appointed arbitrator. If removed from the arbitration, Grabbert's arbitrator would have no interest in the outcome.[46] Therefore, Grabbert's arbitrator had a direct financial interest in the outcome of the arbitration.

Despite this finding, the court refused to affirm the lower court decision and instead reversed, reinstating the award. The court reversed on the grounds that Aetna had failed to establish the required causal nexus between the party-appointed arbitrator's contingency fee arrangement and the ultimate outcome of the arbitration hearing.

The *Grabbert* court's decision is a dichotomy. On one hand, the court adopted the "reasonable person" standard in determining evident partiality to one party to an arbitration,[47] developed in *Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds*.[48] In *Morelite*, the Second Circuit found evident partiality in an arbitrator who was the son of a vice-president of the international union whose local district union was a party to the arbitration. Knowing nothing of the relationship between the arbitrator son and the father, other than the familial relationship, the court still found evident partiality because "reasonable people would have to believe [the relationship] provides strong evidence of partiality by the arbitrator."[49] Applying this test to the present case, the *Grabbert* court found that a reasonable person would similarly conclude that the amount of the arbitrator's fee being contingent on the amount of the arbitration panel's award provided strong evidence of partiality by the arbitrator.[50] Consequently, the court found that a direct financial interest, ethical violations, and a reasonable belief of partiality

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44. West Towns Bus Co. v. Division 241, 168 N.E.2d 473 (Ill. App. Ct. 1960).

45. *Id.*

46. *Grabbert*, 590 A.2d at 95.

47. *Id.* at 96.

48. 748 F.2d 79 (2d Cir. 1984).

49. *Morelite*, 748 F.2d at 84-85.

50. *Grabbert*, 590 A.2d at 96.

existed.

On the other hand, the court failed to affirm the lower court's decision to vacate the award because of Aetna's failure to establish a causal relationship between the contingency fee agreement and the ultimate award. Furthermore, the court held that the present case could be distinguished from *Morelite*. The court made the distinction because the arbitration panel reached a unanimous decision, thus supporting the position of Grabbert's arbitrator regardless of his bias, and because Aetna's challenge did not come until after the court's decision in *Pepin v. American Universal Insurance Co.*,[51] which challenged an arbitration award due to partiality. Because Aetna amended its complaint to include allegations of partiality after *Pepin* was decided, the court felt that the arbitrator's improper conduct had little direct effect on the award.[52]

VI. CRITIQUE

The outcome of the case was not logical based on the decisions of the court. It is unfathomable how the *Grabbert* court could make the findings it did, yet reverse the lower court's order vacating the arbitration award. The court clearly found a direct financial interest by the party-appointed arbitrator in the outcome of the arbitration. Although it never expressly uses "evident partiality," the court applied the *Morelite* test to this financial interest and found such partiality on behalf of the arbitrator. According to the Federal Arbitration Act, the Rhode Island statute, and the Code of Ethics for Arbitrators in Commercial Disputes, such a finding of partiality clearly mandates overturning the award upon proper motion by Aetna.

The *Grabbert* court, however, refused to overturn the award not only because of Aetna's late filing, but also because the award was unanimous. While the court's ruling was meant to support the policy concerns of preserving the finality of arbitration awards and thereby further bolstering public confidence in such awards, the court's justification is misapplied. When ethical violations are found, whether a causal relationship exists between the violation and the outcome should be irrelevant. The ethical violations presented here should *per se* allow a trial on the issue of damages. The court has no way of determining what influence the non-neutral party-appointed arbitrator had on the proceedings. Perhaps Grabbert's arbitrator was so overbearing and

51. 540 A.2d 21 (R.I. 1988).

52. *Grabbert*, 590 A.2d at 96-97.

convincing as to undermine the panel's ability to view the facts objectively. His violation of the arbitrators' ethical code so tainted the proceedings as to warrant rehearing of the issues.

Furthermore, the court's failure to attack the award on the grounds of Canon V of the Code of Ethics for Arbitrators in Commercial Disputes is an interesting oversight. Canon V provides that "[a]n arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision."[53] Certainly the fee arrangement here could be considered an outside interest which might affect the arbitrator's decision. The court may not have felt this provision applied because it is mitigated by Canon VII-E, which permits a non-neutral arbitrator "to be predisposed toward deciding in favor of the party who appointed [him or her]."[54] Canon V was never expressly addressed by the court.

The court's ruling in *Grabbert* may actually serve to erode public confidence in arbitration. While the integrity of the arbitration process is supported by a general policy of finality of judgments, it is certainly destroyed by a belief that an award, tainted with ethical violations by an arbitrator, cannot be successfully challenged.

The *Grabbert* court broadly rejected all contingency fee arrangements for party-appointed arbitrators,[55] yet it allowed this award to stand. The court claimed that regardless of the policy concern for finality of judgments, improper awards should be overturned[56] -- but then failed to do so.

VII. RECOMMENDATIONS

Promulgating standards to apply in situations where partiality on the part of a party-appointed arbitrator may exist would be helpful. A *per se* rule could be employed which would require the overturning of an arbitration award any time there is a showing of bias on the side of the prevailing party. If bias is suspected after an arbitration panel renders an

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53. AMERICAN ARBITRATION ASSOCIATION, *supra* note 26, at 11.

54. *Id.* at 15.

55. "In our opinion, the only acceptable method of calculating an arbitrator's fee is on the basis of time worked." *Grabbert*, 590 A.2d at 96.

56. "As a general rule we feel that no matter how desirable the finality of an arbitration may be, it is more important that an award be rendered free from any improprieties that affect the award and that could destroy public confidence in and the integrity of the arbitration process." *Id.* at 92 (citing Barcon Associates, Inc. v. Tri-County Asphalt Corp., 430 A.2d 214, 219 (1981) (citing Moshier v. Shear, 102 Ill. 169, 174 (1881)).

award, the sanctioning court could hold a hearing on the issue of bias. Should bias be found, the court would refer the matter back to arbitration, requiring a new arbitrator in place of the biased arbitrator. If no bias is found, the matter would proceed as normal, with the parties deciding whether to accept the arbitration award. Furthermore, if bias is suspected prior to the arbitration, either party could make a motion to the sanctioning court to remove the arbitrator. A judge could make a determination whether the arbitrator is biased on the basis of the facts presented in the motion and rule appropriately. Such a rule could be easily applied and would lend predictability and precedent to questions regarding suspicions of bias. It would urge arbitrators to disclose any semblance of bias which might exist before the arbitration, allowing a substitute arbitrator to be selected should any conflict appear. Substituting arbitrators prior to the arbitration would prevent rehearing on the issue of bias before a court, as well as a rehearing on the merits, which would aid in the promotion of finality of arbitration decisions. Moreover, such a *per se* test, rigidly applied, would bolster integrity in the arbitration process. This system would allow participation of arbitrators who could be both impartial and able to represent parties' interests because of the arbitrators' expertise in the subject matter of the dispute.

VIII. CONCLUSION

The Federal Arbitration Act and the parallel state statutes offer insufficient guidance in the application of the evident partiality standard. The Code of Ethics for Arbitrators in Commercial Disputes and certain case law help to clarify the appropriate standards. Cases such as *Grabbert*, however, do nothing but muddy the waters and lead to even greater litigation to clarify the issues of arbitrator impropriety and the finality of arbitration awards. Given an opportunity to develop standards which would aid in the promotion of ADR integrity, the Rhode Island Supreme Court failed to provide an easily applied and predictable test, leaving that task to courts faced with similar issues.

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